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No. 85-1761

In the Supreme Court of the United States

OCTOBER TERM, 1985

HOLYOKE WATER POWER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board correctly found that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by refusing to grant a union-designated industrial hygienist access to part of its plant in order to observe and survey noise level hazards.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 778 F.2d 49. The decision and order of the National Labor Relations Board (Pet. App. C1-C8), including the decision of the administrative law judge (Pet. App. D1-D13), are reported at 273 N.L.R.B. No. 168.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1985. On February 5, 1986, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 26, 1986. The petition was filed on April 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges an order of the National Labor Relations Board (NLRB or Board), enforced by the court of appeals, that it afford a union-designated industrial hygienist access to part of its workplace.

1. Petitioner operates a power plant in Holyoke, Massachusetts. One room in the plant contains two large fans which force air into the plant's burners. This "fan room" is extremely noisy. Petitioner has posted notices stating that "Hearing Protection Must Be Worn" in the fan room, and it provides earmuffs—which, however, are not always effective—for employees required to enter the room. No employees work full time in the fan room, but petitioner's mechanics and operators periodically enter the room to perform maintenance and repair work. Employees who work in the fan room have suffered from effects of the noise, including ringing in the ears, temporary decrease of hearing, and excessive fatigue. Pet. App. C1-C2, D1, D5-D6.

In 1981 and 1982, petitioner converted the plant's power source from oil to coal. Prior to the conversion, the fans in the fan room ran at full speed 60 percent of the time. After the conversion, they ran at full speed 95 percent of the time. Pet. App. D3, D5.

The Union, Local 455, International Brotherhood of Electrical Workers, has been the collective bargaining representative of production and operations employees at the plant since 1971.[1] In 1981, pursuant to a reopener provision in the parties' collective bargaining agreement, petitioner and the Union began negotiations on the effects, including the health and safety effects, of the coal conversion upon bargaining unit employees. Following a dispute

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[1]The Union intervened in the court of appeals and hence is a respondent before this Court.

in which the Union filed unfair labor practice charges with the Board, the parties entered into a settlement agreement permitting the Union's industrial hygienist to survey hazards associated with the conversion to coal. Pet. App. D3-D4.

Pursuant to the Union's request in January 1983, petitioner granted the Union hygienist access to certain parts of the plant. The Union specifically asked that the hygienist be granted access to the fan room to evaluate its noise levels. Petitioner, however, refused access to the fan room on the ground that it was not specified in the settlement agreement.[2] Instead, petitioner gave the Union a summary of a plantwide noise survey that it had done the previous summer; the survey did not contain information relating specifically to the fan room, but rather showed average noise level exposures for certain employees. Petitioner later had one of its officials, not an industrial hygienist, take a noise level reading in the fan room, and supplied it to the Union. Pet. App. C2, D4-D6.

2. The Board, adopting the conclusion of the administrative law judge (ALJ), found that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by refusing to grant the Union's hygienist access to the fan room in order to observe and record noise level hazards (Pet. App. C1-C8). In so finding, the Board relied on this Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and reasoned that a union request for access to an employer's plant to obtain relevant information required the Board to "balance

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[2]While we do not concede that access to the fan room was not contemplated by the terms of the settlement, it is sufficient to note here that its inclusion vel non there is irrelevant, since the settlement of a particular unfair labor practice charge does not extinguish an employer's general statutory obligation to bargain about health and safety conditions (see Pet. App. A3-A4).

the employer's property rights against the employees' right to proper representation" (Pet. App. C4). The Board stated that where "responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end" (*ibid.*). It stated further that where, on the other hand, "it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access" (*id.* at C4-C5).[3]

Applying this principle here, the Board concluded that petitioner's "property rights * * * are outweighed and that [it] must afford the union hygienist reasonable access to its fan room to conduct noise level studies" (Pet. App. C5). The Board found that because "exposure to excessive noise presents potential health hazards" and "no one disputes that the * * * fan room is very noisy," "the employees' right to responsible representation" requires that the Union have access to the room "to ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected" (*ibid.*). The Board found that the test results that

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[3]In setting forth the balancing test to be applied to union requests for access to an employer's plant to obtain relevant information, the Board overruled its decision in *Winona Industries*, 257 N.L.R.B. 695 (1981), relied on by the ALJ, to the extent it set forth an inconsistent analysis (Pet. App. C3, C5). In *Winona Industries*, the Board held that a union's request for an in-plant inspection of health and safety conditions by its designated industrial hygienist was in the nature of a request for "information relevant to the [union's] proper performance of its duty to represent * * * employees with respect to terms and conditions of their employment," and that an employer's obligation to grant such a request "is basic and unqualified" (257 N.L.R.B. at 697-698 (footnote omitted)). The Board in that case did not expressly discuss balancing the union's interests against the employer's property interests or the need to consider alternative means for the union to obtain the requested information.

petitioner supplied the Union were an insufficient alternative because the data were irrelevant or incomplete and there was a dispute as to the method and results of the tests (*id.* at C6, D8-D9). Finally, the Board noted that, because the fan room is not a production area and no employees work there full time, granting access to the Union's hygienist would involve "little if any interference with the production process" (*id.* at C5-C6).

3. The court of appeals enforced the Board's order (Pet. App. A1-A7). At the outset, the court agreed with the ALJ's conclusion that, under *Winona Industries*, 257 N.L.R.B. 695 (1981), petitioner was required to grant the hygienist access to the fan room (Pet. App. A3). Noting that the Board had rejected the *Winona* test and instead had applied a balancing test drawn from *Babcock & Wilcox, supra*, the court stated that "*Babcock & Wilcox* and its progeny do not obviously govern this case" (*id.* at A6),[4] but concluded (*id.* at A7 (footnote omitted)):

> Because we agree with the Board that the outcome in this case is the same under either test, we need not decide whether the general balancing formula of *Babcock & Wilcox* applies to requests for access by unions that already represent the employees. While the outcome necessarily is closer under a balancing test than

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[4]The court noted that the *Babcock & Wilcox* balancing approach was adopted "to handle requests for access by non-employee union organizers who are likely to disrupt the employer's operations," and noted that "the potential for disruption is not as great where, as here, the union already represents the employees, and seeks access only to study a possible threat to the health and safety of its members" (Pet. App. A5-A6). The court noted further that *Babcock & Wilcox* "discusses the employer's duty to refrain from interfering with protected employee activities" under Section 8(a)(1) of the National Labor Relations Act, and the court stated that "[l]ess weight may be due the employer's property rights when the employer is subject to a duty to bargain" under Section 8(a)(5) (Pet. App. A6).

under *Winona*, the company's interest in denying access in the case appears to be insubstantial. The potential for disruption is not great, since the union already represents the employees. The industrial hygienist's investigation will last a day or less. Since no employees are regularly stationed in the fan room, the hygienist will not disrupt employee work patterns.

ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals erred in not expressly approving the application of the *Babcock & Wilcox* balancing test in the circumstances here, and instead "favoring" (Pet. 9) the *Winona* test applied by the ALJ. But the court of appeals explicitly held that it "need not decide" which test is appropriately applied to determine when an incumbent union should be granted access to an employer's plant to observe health and safety conditions, because it concluded that under either test the outcome here would be the same (Pet. App. A7; see also Pet. 7). The restraint exercised by the court of appeals in declining to reach an issue it did not have to is not error and, similarly, there is also no occasion here for this Court to resolve which of the two standards is appropriate.

2. Petitioner's remaining contention (Pet. 17-20) is that the Board, upheld by the court of appeals, erred in concluding under the balancing test that the Union's hygienist is entitled to access to the fan room. That fact-bound issue also does not warrant this Court's review. See, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

In any event, there is no merit to petitioner's contention. As the ALJ, the Board, and the court of appeals all found (Pet. App. A3-A5, A7, C5-C6, D8-D9), noise levels in the

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[5]We note the inconsistency between the petitioner's argument for great deference to the Board with regard to the first question presented, and for no deference at all on the second.

fan room constitute an acknowledged health and safety hazard, and the Union has a substantial interest in understanding precisely the nature of the hazard in order to perform its representative function. The potential intrusion upon petitioner's property and management rights is slight because, as the record shows (*id.* at A7, C5-C6, D9), the fan room is not a production area and an investigation by the hygienist will take little time or trouble. There is, moreover, no reasonable alternative to an on-site inspection in this case. The tests conducted by petitioner are insufficient either because they do not contain the relevant data or are incomplete and disputed by the Union (*id.* at A5, C6, D8); allowing a non-hygienist from the Union—petitioner's other offer—is obviously no solution either, since he would lack the needed expertise. The determination by all three reviewing authorities below that the only workable alternative in this case was allowing testing by the Union's own hygienist was correct. Cf. *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716, 720 (2d Cir. 1966).[6]

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[6]Thus, there is no merit to petitioner's contention (Pet. 19) that the Union should have been obliged to show that it "unsuccessfully attempted to utilize other means" of obtaining the information before petitioner could be compelled to grant access to the fan room: that obligation was met. As the court of appeals noted (Pet. App. A5), the Union "reasonably concluded" that its own hygienist would need access to the fan room. And, as the court further noted (*ibid.*), petitioner did not offer to provide any information to the Union as an alternative to granting access until after the unfair labor practice charge had been filed. Under those circumstances, the Union could "reasonably conclude[ ] that it could not obtain the information without an order from the Board" (*ibid.*). The decision in *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794, 797-798 (3d Cir. 1971), cert. denied, 409 U.S. 1012 (1972), cited by petitioner (Pet. 19), is therefore inapplicable. In that case, involving union organizers conducting an organizing campaign among employees, the union had failed to show that there were no reasonable alternatives to intruding on the employer's property in order to meet and talk to employees. Here, by contrast, it was shown that the relevant

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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information could accurately be obtained only by an inspection of the fan room.

Finally, petitioner's claim (Pet. 19) that the Board's decision has established "a *per se* right of access" whenever health or safety concerns are at issue is erroneous. As the Board made clear (Pet. App. C5), "the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision."